APPENDIX

APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15299-J

OMAR SILVA MEDINA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Omar Silva Medina moves for a certificate of appealability ("COA") in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate. We granted Medina leave to file that second or successive § 2255 motion after noting that he made a *prima facie* case sufficient to file a successive § 2255 motion raising a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015) in the district court because it was unclear which companion conviction formed the basis for his convictions and sentences under 18 U.S.C. § 924(c).

Medina is a federal prisoner serving a 192-month sentence after a jury convicted him of 6 offenses: (1) conspiracy to possess with the intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. § 846; (2) attempting to possess with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. § 841; (3) conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); (4) attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); (5) conspiracy to use, carry, or possess a firearm during, and in relation to, a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. § 924(o); and (6) using and carrying a firearm during, and in relation to, a crime of violence or drug-trafficking crime, in violation of § 924(c)(1).

In his § 2255 motion, Medina claimed that the holding in *Johnson* should extend to invalidate the risk-of-force clause in 18 U.S.C. § 924(c) because it is similar to the now-voided residual clause of the ACCA. Medina has not shown that reasonable jurists would find debatable or wrong the district court's denial of this claim. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court correctly denied Medina's § 2255 motion in light of *Ovalles v. United States*, 861 F.3d 1257, 1265-66 (11th Cir. 2017), in which we held that § 924(c)(3)(B) was still valid, post-*Johnson*. Consequently, Medina's underlying claim that the holding in *Johnson* applied to, and invalidated, § 924(c)'s risk-of-force clause is foreclosed by our binding precedent. *See id.*

Accordingly, Medina's motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 16, 2018

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Appeal Number: 17-15299-J
Case Style: Omar Medina v. USA
District Court Docket No: 1:16-cv-23386-RLR
Secondary Case Number: 1:08-cr-20287-RLR-6

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C. Burney-Smith, J
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-2

NO. 17-15299-J

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OMAR SILVA MEDINA,
Petitioner/appellant.,

v.

UNITED STATES OF AMERICA,
Respondent/appellee

On Appeal from the United States District Court for the Southern District of Florida

MOTION FOR CERTIFICATE OF APPEALABILITY BY APPELLANT OMAR SILVA MEDINA

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THIS CASE IS ENTITLED TO PREFERENCE (28 U.S.C. § 2255 APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Omar Silva Medina v. United States of America
Case No. 17-15299-J

Appellant Omar Silva Medina files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, R. Alexander, Former United States Attorney

Bandstra, Honorable Ted E., United States Magistrate Judge

Becker, Abigail Emily, Assistant Federal Public Defender

Borrego, Leonardo, Co-Defendant

Brown, Honorable Stephen T., United States District Judge

Caruso, Michael, Federal Public Defender

Da La Cruz, Diego Diaz, Co-Defendant

Feiler, Jeffrey Evan, Defense Attorney

Ferrer, Wifredo A., Former United States Attorney

Flores, Rene, Co-Defendant

Gaviria, Frank J., Defense Attorney

Garber, Honorable Barry L., United States Magistrate Judge

Gold, Honorable Alan S., United States District Judge

Gonzalez, Juan De Jesus, Defense Attorney

Greenberg, Benjamin G., Acting United States Attorney

Healy, William C., Assistant United States Attorney

Houlihan III, Raymond D'Arsey, Defense Attorney

Jubiel, Alexy, Co-Defendant

Klugh Jr., Richard Carroll, Defense Attorney

Koukios, James M., Department of Justice Fraud Section, Criminal Division

Lowenthal, Sheryl Joyce, Defense Attorney

Machin, Carlos Hernandez, Co-Defendant

McAiley, Honorable Chris M., United States Magistrate Judge

McCrae, M. Caroline, Assistant Federal Public Defender

McPartland-Lyons, Anne Marie, Defense Attorney

O'Sullivan, Honorable John J., United States Magistrate Judge

Rengel, Alexandra Isabel, Defense Attorney

Rodriguez, Marlene, Assistant United States Attorney

Rosenberg, Honorable Robin L., United States District Judge

Shelvin, Barry Ted, Defense Attorney

Simonton, Honorable Andrea M., United States Magistrate Judge

Silva Medina, Omar, Defendant/Appellant

Sloman, Jeffrey H., Defense Attorney

Smachetti, Emily M., Assistant United States Attorney

Suri, Arnaldo Jesus, Defense Attorney

Wear, Nancy Cayford, Defense Attorney

United States of America, Petitioner/Appellee

White, Honorable Patrick A., United States Magistrate Judge

MOTION FOR CERTIFICATE OF APPEALABILITY

Omar Silva Medina, through undersigned counsel, respectfully moves this Court for a certificate of appealability ("COA") on the following question:

> Whether the district court erred by denying Mr. Silva Medina's motion to vacate, set aside, or correct his sentence, brought pursuant to 28 U.S.C. § 2255, alleging that he was actually innocent of violating 18 U.S.C. §§ 924(c) and 924(o) after *Johnson v. United States*, 135 S. Ct. 2551 (2015).

I. PROCEDURAL HISTORY

On April 8, 2008, Mr. Silva Medina was charged in 6 counts of a 7-count Indictment with one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846; one count of attempted possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2; one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); one count of attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 (a) and 2; one count of conspiracy to possess a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(o); and one count of possession of a firearm in furtherance of a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Case No. 08-

CR-20287, D.E. 37).

Mr. Silva Medina was sentenced on January 26, 2009, to a total term of 192 months' imprisonment, which consisted of concurrent 132 month sentences as to Counts 1 through 5 and a consecutive term of 60 months as to Count 6. (Case No. 08- CR-20287, D.E. 184, 186.) Mr. Silva Medina filed a direct appeal, and on May 5, 2010, his convictions and sentences were affirmed. (Case No. 08-CR-20287, D.E. 240.)

On June 29, 2011, Mr. Silva Medina filed a pro se Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255, in which he argued that he received ineffective assistance of counsel, based on a failure of trial counsel to inform Mr. Silva Medina of the strength of the government's evidence against him and the right to enter an Alford plea (Case No. 08-CR-20287, D.E. 243). On June 12, 2012, Mr. Silva Medina's Motion to Vacate, Set Aside, or Correct Sentence was denied. (Case No. 08-CR-20287, D.E. 245.)

On June 20, 2016, Mr. Silva Medina filed a pro se Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence (Application) with this Court, pursuant to 28 U.S.C. § 2255, in which he argued, among other grounds, that his sentence was unconstitutional, based on the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). On August 4, 2016, this Court granted Mr. Silva Medina's Application. (Case No. 08-CR-20287 D.E. 270).

On August 24, 2016, Mr. Silva Medina filed a successive pro se Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255 and a Memorandum in Support of his motion, in which he argued, among other grounds, that his sentence was unconstitutional, based on the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Case No. 16-CV-23386, D.E. 4 and 5.) On September 2, 2016, the District Court appointed the Federal Public Defender to represent Mr. Silva Medina in all further stages of this § 2255 proceeding (Case No. 16-CV-23386, D.E. 6).

On May 22, 2017, the Magistrate Court entered a Report and Recommendation ("R & R") recommending that the District Court deny Mr. Silva Medina's motion to vacate and that no certificate of appealability be issued. (Case No. 16-CV-23386, D.E.26). The Magistrate Court assumed for the sake of argument that the attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery were no longer crimes of violence, but relied on the attempt to possess with intent to distribute and conspiracy to possess with intent to distribute counts to justify Mr. Silva Medina's § 924(c) conviction. (Case No. 16-CV-23386, D.E.26).

On September 29, 2017, the District Court entered an Order Adopting the

Magistrate's Report and Recommendation, denied Mr. Silva Medina's motion, and did not issue a COA. (Case No. 16-CV-23386, D.E.33). The District Court adopted the reasons set forth in the R & R and considered *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) to be binding precedent requiring the denial of relief for Mr. Silva Medina. (Case No. 16-CV-23386, D.E.33).

II. LEGAL STANDARD

A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As the Supreme Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Supreme Court recently applied this standard in *Welch v. United States*, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-64. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively in cases on collateral review. *Id.* at 1268. But, in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether his robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-64, 1268. Accordingly, the Court held that a COA should issue. As explained below, Mr. Silva Medina has satisfied this standard.

III. MR. SILVA MEDINA SHOULD BE GRANTED A COA, BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER MR. SILVA MEDINA IS ENTITLED TO RELIEF ON HIS §§ 924(c) AND 924(o) CLAIMS

"[R]easonable jurists could at least debate whether [Mr. Silva Medina] is entitled to relief" on his §§ 924(c) and 924(o) claims following *Johnson*. *Welch*, 136 S. Ct. at 1268.

A. Reasonable Jurists Could Debate Whether *Johnson* Invalidated the § 924(c) Residual Clause

On June 30th, without hearing oral argument, a panel of this Court issued a published decision holding as a matter of first impression that *Johnson*'s determination that the ACCA's residual clause was unconstitutionally vague "does not apply to or invalidate" the similar residual clause in 18 U.S.C. §924(c)(3)(B). *Ovalles*, 861 F.3d at 1265. However, the correctness of the *Ovalles* panel's reasoning can be – and is being – debated among reasonable jurists both within this Circuit and across the country at this time, and a COA should issue for the following reasons.

1. Only a week after the issuance of the decision in *Ovalles*, the mandate was *sua sponte* withheld by the Court, and that non-final decision may still be reconsidered and withdrawn. On July 6, 2017 – only one week after *Ovalles* was issued – this Court *sua sponte* withheld the mandate in *Ovalles*. *See Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017)("Mandate Withheld Pursuant to Court Instructions."). This near-immediate, *sua sponte* reaction may indicate that there is interest on the Court in rehearing *Ovalles* en banc. Or, it may mean that members of the Court believe *Ovalles* could be affected by the Supreme Court's decision in *Sessions v. Dimaya* (U.S. No. 15-1498) on the related issue of whether *Johnson* renders the identically-worded residual clause in 18 U.S.C. §16(b) unconstitutionally vague.

Notably, it appears that the Court is itself still debating the constitutional issue in *Dimaya*, since it has ordered re-argument at the beginning of the new term to definitively decide the case. *See* DEs of Jan. 17 and June 26, 2017. And plainly, because §16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could itself abrogate *Ovalles*. Notably, *Ovalles* made no mention of *Dimaya*, even though the government in *Dimaya* is seeking to distinguish §16(b) from the ACCA's residual clause on the same bases that the *Ovalles* panel distinguished §924(c)(3)(B).

In any event, whatever the reason for the withholding of the mandate in *Ovalles*, the panel's decision is not yet final. And significantly, multiple judges on this Court have now granted joint motions by the defense and government to stay the briefing schedule in §924(c)/*Johnson* appeals pending issuance of the *Ovalles* mandate. *See Davenport v. United States*, Case No. 16-15939-GG (11th Cir. July 21, 2017)(Jordan, J.); *Barriera-Vera v. United States*, Case No. 17-10029 (11th Cir. July 24, 2017)(Tjoflat, J.); *Wilkes v. United States*, Case No. 16-17658 (11th Cir. July 25, 2017)(Wilson, J.); *Blackman v. United States*, Case No. 16-17294 (11th Cir. July 26, 2017)(Martin, J.); *Young v. United States*, Case No. 16-17300 (11th Cir. July 27, 2017)(Tjoflat, J.); *Paige v. United States*, Case No. 16-16043 (11th Cir. July 28, 2017)(Rosenbaum, J.); *Trubey v. United States*, Case No. 16-17663 (11th Cir. Aug. 1, 2017)(Wilson, J.). These stays would not likely have been granted if the analysis in *Ovalles* was "beyond all debate." Clearly, it is not. The decision may well be short-lived.

Since the law in this area remains in tremendous flux, it would be imprudent and inefficient for the Court to rely on *Ovalles* now to deny a COA. Doing so would needlessly result in an additional round of litigation if *Ovalles* is abrogated by *Dimaya*. Even if *Ovalles* is not completely abrogated, *Dimaya* may at least require reconsideration of certain conclusions in *Ovalles* either by the panel or the en banc Court. The constitutional issue resolved by the *Ovalles* panel is now being vigorously debated among reasonable jurists throughout the country. And that debate will continue – at the very least – until *Dimaya* is decided.

2. Whether *Johnson*'s invalidation of the ACCA's residual clause as unconstitutionally vague has rendered §924(c)'s residual clause unconstitutional as well, is an issue that has divided the circuits and it remains debatable among reasonable jurists at this time. In *Johnson*, the Supreme Court held the *residual* clause in 18 U.S.C. §924(e)(2)(B)(ii)("otherwise involves conduct that presents a serious risk of physical injury to another") to be unconstitutionally vague because the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." 135 S. Ct. at 2557. In the Supreme Court's view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the "risk" posed by that ordinary case, was constitutionally problematic: "[t]he residual clause offers no reliable way to choose between ... competing accounts of what 'ordinary' ... involves." *Id.* at 2558. As a result, "[g]rave uncertainty" as to how to determine the risk posed by the "judicially imagined ordinary case" led the Court to conclude that the residual clause was void for vagueness. *Id.* at 2557.

It is well-settled in this Circuit that the same, *categorical* "ordinary case" inquiry that led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally vague applies to the similarly-worded residual clauses in 18 U.S.C. §924(c)(3)(B) and 16(b). In *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), Justice O'Connor sitting by designation held that whether an offense is a "crime of violence" "within the ambit of 18 U.S.C. §924(c)" is a question "that we must answer 'categorically' – that is, by reference to the elements of the offense, and not the actual facts of McGuire's conduct." *Id.* at 1336. And, she explained, "[w]e employ the categorical approach" under both the elements and residual clauses of §924(c),

> because of the statute's terms: It asks whether McGuire committed "an offense" that "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another," or that "*by its nature*, involves a substantial risk that physical force against the person or property of another may be used. 18 U.S.C. §924(c)(3)(A)-(B) (emphasis added).

Id. at 1336-1336 (emphasis in original).

Notably, the residual clause in §924(c) is identical to 18 U.S.C. §16(b). *Compare* §924(c)(3)(B) (offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense") *with* §16(b) (offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used on the course of committing the offense"). And the law in this Circuit is clear that the same "ordinary risk" analysis this Court applied pursuant to the categorical approach in ACCA residual clause cases applies equally in the §16(b) context. *See United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. May 13, 2015) (as a matter of first impression, "adopt[ing] the 'ordinary case' standard [from *James*] for analyzing §16(b);" "applying the categorical approach looking only to the ordinary case;" concluding that a violation of 18 U.S.C. §2422(b) for enticing a minor is a "crime of violence" under §16(b) since the "ordinary" violation involves a substantial risk that the defendant may use physical force in the course of committing the offense).

Because other circuits as well have employed similar approaches in analyzing these provisions, in the aftermath of *Johnson* the Third, Seventh, Ninth, and Tenth Circuits have each ruled that 18 U.S.C. §16(b) – which again, is identical to §924(c)(3)(B) – is void for vagueness in light of *Johnson*. *See Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016), *gov't pet. for cert. filed* Feb. 6, 2017 (No. 16-978); *Golikov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), *gov't pet. for cert. filed* Feb. 2, 2017 (No. 16-966); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), *gov't pet'n for reh'g denied* (Mar. 22, 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S.Ct. 31 (U.S. Sept. 29, 2016); *see also Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (same), *gov't pet. for cert filed* Feb. 13, 2017 (No. 16-991); *In re Hubbard*, 825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting split); *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir.

2016) (§16(b)'s residual clause as incorporated in U.S.S.G. §2L1.2(b)(1)(C) is void for vagueness in light of *Dimaya*), *gov't pet. for cert. filed* Nov. 7, 2016 (No. 16-617).

On November 18, 2016, in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit became the first federal circuit to specifically address the constitutionally of §924(c)'s residual clause in light of *Johnson*. And notably, the Seventh Circuit held that because §924(c)'s residual clause was "virtually indistinguishable" from the ACCA's residual clause which "*Johnson* found to be unconstitutionally vague," §924(c)(3)(B) was unconstitutionally vague as well. *Id.* at 996 (noting that §924(c)'s residual clause was "the same residual clause" in §16(b) that the court had already invalidated in *Vivas-Ceja*). The panel's decision in *Ovalles* directly conflicts with that of the Seventh Circuit in *Cardena*.

Although that direct circuit split is itself sufficient to meet *Slack*'s "reasonable jurists could debate" standard and require the issuance of a COA here, *see Lambright v. Stewart*, 220 F.3d at 1028-29, the clear "debatability" of the reasoning in *Ovalles* is confirmed by the number of reasonable jurists at the district court level throughout this country who have specifically found the residual clause of §924(c)(3)(B) unconstitutionally vague in light of *Johnson*.

For decisions outside this Circuit, *see, e.g.*, *United States v. Smith*, No. 2:11-CR-058-JAD-CWH, 215 F. Supp. 1026 (D. Nev. May 18, 2016); *United States v.*

Lattaphom, 159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016); *United States v. Edmundson*, 153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015).

For decisions within this Circuit, *see, e.g.*, *Mann v. United States*, Case No. 16-22605-Civ-Ungaro, DE22 & DE 27 (Orders of March 16 and April 19, 2017); *Jardines v. United States*, Case No. 16-22604-Civ-Ungaro, DE 17 and DE 21 (Orders of March 17, and April 19, 2017); *Duhart v. United States*, Case No. 16-61499-Civ-Marra, DE 13 and DE 18 (Orders of September 9, 2016, and February 1, 2017); and *Hernandez v. United States*, Case No. 16-22657-Civ-Huck (Order of September 27, 2016).

In rejecting the views of these jurists, the *Ovalles* panel emphasized that the ACCA and §924(c) are not word-for-word identical. In particular, the panel found "significant" and "material" the fact that §924(e)(2)(B)(ii), defines a "violent felony" as an offense that "*otherwise* involves conduct that presents a serious potential risk of *physical injury* to another," while §924(c)(3)(B) defines a crime of violence as one that "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used *in the course of committing the offense*." *See Ovalles*, 861 F.3d at 1263-1265.

These are minor differences in the wording of the two provisions. They are neither significant nor material when considered against the Supreme Court's actual reasoning in *Johnson*. For the reasons detailed below, the *Ovalles* panel's conclusions to the contrary are debatable for multiple reasons.

3. Section 924(c)'s residual clause is not "markedly narrower" than the ACCA residual clause at issue in *Johnson*. The textual differences between the residual clause of the ACCA at issue in *Johnson* and the residual clause of §924(c) (and its twin §16(b)) are not material because they do not impact the constitutional analysis in any manner. The *Ovalles* panel ignored the fact that not only in this Circuit, but in other circuits as well, these provisions have always been regarded as analogous and analyzed identically. *See United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (describing the ACCA residual clause and the residual clause of §16(b) as "analogous"); *Vivas-Ceja*, 808 F.3d at 722 ("§16(b) substitutes 'substantial risk' for the residual clause's 'serious potential risk.' Any difference between the two phrases is superficial. Just like the residual clause [in §924(c)], §16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'"); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (noting that, "[d]espite the slightly different definitions," the Supreme Court's respective analyses of the ACCA and §16(b) "perfectly mirrored" each other). *See also United States v. Gomez-Leon,* 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir.

1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the statutes as "immaterial" and holding that U.S.S.G. §4B1.2, which uses the ACCA language, "is controlled by" a decision that interprets §16(b)).

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities.[1] Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both §16(b) and §924(c) is a risk that force will be used against person or property, this difference is immaterial to the due process problem and has no impact on the applicability of *Johnson* to this case. This is because the Supreme Court's holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and

1 Though the comparison tends to mostly address 18 U.S.C. § 16(b), that provision is identical to §924(c)(3)(B). *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009)(citing circuit splits on § 16(b) in the context of a residual clause case because §16(b) "closely resembles ACCA's residual clause")(Alito, J., concurring). *See also United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010)(relying on an ACCA case to interpret the definition of a crime of violence under §924(c)(3)(B)); *United States v. Aragon*, 983 F.2d 1306, 1314 (4th Cir. 1993)(same); *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014)(using both ACCA cases and § 16(b) cases to define the same "ordinary case" analysis); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014)(despite the fact that the ACCA talks of risk of injury and §16(b) talks of risk of force, "we have previously looked to the ACCA in deciding whether offenses are crimes of violence under §16(b)").

quantifies the risk.[2] In fact, the Solicitor General has candidly conceded that § 16(b) is "equally susceptible to ... the central objection" in *Johnson*—namely, that they both "require[d] a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Johnson*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and §924(c)(a twin to §16(b)). All three statutes require courts first to picture the "ordinary case" embodied by a felony, and then decide if it qualifies as a crime of violence by assessing the quantum of risk posed by the "ordinary case."[3] The *Ovalles* panel

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2 Of course, many federal and state criminal laws include "risk" standards that employ adjectives similar to those in the ACCA and §924(c), such as "substantial," "grave," and "unreasonable." And the Supreme Court in *Johnson* said it did not mean to call most of these into question. But, as Justice Scalia's majority opinion observed, that is because the vast majority of such statutes require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion; in other words, applying such a standard to "real-world conduct." By contrast, the ACCA's residual clause, and §924(c)(3) too, require it to be applied to "an idealized ordinary case of the crime," an "abstract inquiry" that "offers significantly less predictability." *Johnson*, 135 S. Ct. at 2558.

3 The ACCA, §924(c), and §16(b) require courts to discern what the "ordinary case" of a crime is by using the categorical approach. Courts may not consider the factual means of committing any given offense, but must consider the nature of the offense in the "ordinary case," regardless of whether the ACCA, §924(c)(3)(B), or § 16(b) is at issue. *See Keelan*, 786 F.3d at 871 (adopting "ordinary case" analysis for identical provision in §16(b)); *see also United States v. Naughton*, 621 F. App'x 170, 178 (4th Cir. Sept. 2, 2015)(applying the ordinary case inquiry to the residual clause of §924(c)); *Fuertes,* 805 F.3d at 498; *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2012)(citing *James* as the source of the "ordinary case" analysis required by §16(b)); *United States v. Butler*, 496 F. App'x

unfairly ignored this *material identity* in the way predicate crimes have always been analyzed under these statutes – not only in other circuits, but in our circuit. There is no acknowledgement of *McGuire*, *Keelan*, or the dictates of the categorical approach in the panel's entire discussion of §924(c)'s residual clause.[4]

As other courts have rightly explained, the "§924(c) residual clause suffers from exactly the same double indeterminancy as the ACC residual clause." *Edmundson*, 153 F. Supp. 3d at 862. Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating §16(b), the identical twin to §924(c)(3)(B), as void for vagueness under *Johnson*. *See Vivas-Ceja,* 808 F.3d at 722; *Dimaya*, 803 F.3d at 1117.

Section 924(c)'s residual clause, like the ACCA residual clause, similarly requires the "ordinary case" analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is – the identical analytical steps that

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158, 161 n.4 (3d Cir. 2012); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011); *United States v. Serafin*, 562 F.3d 1104, 1108 (10th Cir. 2009); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009) (considering §16(b) and concluding that "[t]he proper inquiry is one that contemplates the risk associated with the proscribed conduct in the mainstream of prosecutions brought under the statute."); *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007); *United States v. Acosta*, 470 F.3d 132, 134 (2d Cir. 2006); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995).

4 The *Ovalles* panel cited *McGuire* only in its analysis of whether carjacking qualified under §924(c)'s elements clause, 861 F.3d at 1268-1269–even though *McGuire* clearly held that the categorical approach applies in analyzing predicate offenses under ***both*** the elements ***and*** the residual clauses of §924(c).

brought down the ACCA residual clause – and thus §924(c)'s residual clause cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under §924(c).

To the extent the *Ovalles* panel characterized the residual clause of §924(c) as "markedly narrower" than the ACCA's residual clause in two respects, it erred. The panel noted first that §924(c)'s residual clause requires a "risk of injury" to the victim and in its view that was "more definite" than a "risk of physical force" being used against the victim. Second, it argued, §924(c)'s residual clause is also temporally "narrower" than the ACCA's residual clause because it looks to the risk of force "aris[ing] during the commission of the offense." 861 F.3d 1263-1264.

But like the absence of enumerated offenses (discussed *infra*), these textual differences simply have no bearing on the threshold "ordinary case" inquiry that the Supreme Court determined is impossibly arbitrary, and that this Court held in *Keelan* applies to the precise language at issue here.[5] In focusing specifically on

5 That inquiry requires the Court to imagine the facts that typically make up the predicate crime. That inquiry involves asking whether, for example, "the ordinary instance of witness tampering involve[s] offering a witness a bribe? Or threatening a witness with violence?" *Johnson*, 135 S. Ct. at 2557. Or whether the "ordinary burglar invade[s] an occupied home by night or unoccupied by day?" *Id.* at 2558. Or "[d]oes the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?" *Id.* Or whether the "ordinary case of vehicular flight" is "the person trying to escape from police by speeding or driving recklessly . . . [o]r

the risk during the predicate offense, §924(c)'s residual clause does not call for any narrower an inquiry than the ACCA's residual clause. The Supreme Court's determinations whether certain crimes were sufficiently risky under the ACCA also focused on the risk during the commission of the offense, rather than some time later after it had ended. *See, e.g., James*, 550 U.S. at 203-04, 210 (looking to conduct that typically occurs "while the crime [attempted burglary] is in progress," "while the break-in is occurring," and "during attempted burglaries"); *Sykes*, 131 S. Ct. at 2273-74 (same for crime of vehicular flight from police).

Likewise, the supposedly "typical" conduct the Supreme Court found sufficiently risky in the ACCA cases involved conduct during the predicate crime, rather than at some later time. *See, e.g., James*, 550 U.S. at 211-12 ("An armed would-be burglary may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase"); *Sykes*, 131 S. Ct. at 2274 (driver's knowingly fleeing law enforcement

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is it instead the person driving normally who, for whatever reason, fails to respond immediately to a police officer's signal?" *Sykes v. United States*, 131 S. Ct. 2267, 2291 (2011)(Kagan and Ginsberg, JJ., dissenting). If a court cannot conjure the idealized "typical" scenario in which an offender embarks on the predicate crime, it cannot proceed to determine how the offense is likely to play out and, thus, cannot gauge the riskiness of the probable ensuing conduct – whether that conduct occurs during or after the commission of the crime. As the Ninth Circuit explained, "[t]his reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense." *Dimaya*, 803 F.3d at 1119.

officer held a violent felony given risk that, during pursuit, driver might cause accident or commit another crime to avoid capture). In *no* case did the Supreme Court actually rely on "post-offense conduct" to find a predicate crime sufficiently risky under the ACCA's residual clause. And in fact, the Court specifically questioned whether this would even be a statutorily permissible basis to qualify an offense a "crime of violence." *See Chambers v. United States*, 555 U.S. 122, 129 (2009).

Moreover, in assessing riskiness, §924(c)(3)(B) and its twin, §16(b) – just like the ACCA – looks not just at the initiation of the predicate crime (*e.g.*, the burglar's climbing through the window), but beyond that, through the entire "course" of the offense to its completion (*e.g.*, while the burglar is in the house, until he successfully flees). *See Leocal*, 543 U.S. at 10 ("[B]urglary, by its nature, involves a substantial risk that the burglary will use force against a victim in completing the crime.").

The *Ovalles* panel attempted to distinguish §924(c)(3)(B) from both §16(b) and the ACCA residual clause by pointing to "different function" of these statutes – namely, that § 924(c) is not concerned with recidivism, and requires a "nexus" to the instant companion crime – which it claimed makes that clause "more precise and predictable." 861 F.3d 1267. But the functional difference between these statutes does not change the vagueness calculus in any manner for a simple reason the *Ovalles* panel ignored: According to *McGuire* and *Keelan* the proper analysis under §924(c)(3)(B) is *not* fact-centric, based upon the defendant's real-world conduct. Rather, due to the "*by its nature*" language used by Congress in both §924(c)(3)(B) and §16(b), it is categorical and based entirely on the elements of the offense. And the categorical approach uses the hopelessly indeterminate, impossibly vague "ordinary case" benchmark to measure risk.

In sum, neither the textual or functional distinctions identified by the *Ovalles* panel establish a material difference between the unconstitutional residual clause in the ACCA and the residual clauses in §16(b) and §924(c). All three clauses require courts to divine what the "ordinary case" of a crime is, and then decide whether that abstraction poses enough of a risk to be a qualifying offense. *See Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016)("[A] marginally narrower abstraction is an abstraction all the same."). Whatever textual differences exist between these clauses, they are not significant enough to treat §924(c)(3)(B) differently with respect to *Johnson*'s vagueness analysis. At the very least, reasonable jurists could debate – and are debating – the materiality of the distinctions drawn in *Ovalles*.

4. The list of enumerated offenses preceding the ACCA residual clause was not dispositive in *Johnson*. Another basis upon which the *Ovalles* panel distinguished §924(c)'s residual clause from the ACCA's was the fact that the ACCA's residual clause contained a confusing prefatory list of enumerated offenses which complicated the assessment of risk, whereas §924(c) does not have such a list. 861 F.3d at 1264-1265. While the *Ovalles* panel deemed this difference "material," *id.*, analytically it is not because the Supreme Court's decision in *Johnson* did not hinge on the list of enumerated offenses that precedes the ACCA's residual clause. The Supreme Court simply noted that the enumerated offenses which precede the ACCA residual clause were an *added* problem. *Johnson*, 135 S. Ct. at 2558. The Supreme Court said the residual clause was void for vagueness based on the "two features" turning on the ordinary case – not a third feature turning on the enumerated offenses. *Id.* at 2557; *see also Vivas-Ceja*, 808 F.3d at 723 ("The list [of enumerated offenses] itself wasn't one of the 'two features' that combined to make the clause unconstitutionally vague.") (citing *Johnson*, 135 S. Ct. at 2557).

As a matter of pure logic, *Johnson* could not have turned on the enumerated offenses. The "ordinary case" problem exists ***with or without*** enumerated offenses because a lower court must determine the idealized ordinary case of the predicate offense before it can even begin to evaluate and compare the type of risk presented by that offense. *Id.* at 2557-58. Because courts cannot answer the *threshold question* with any certainty, logic compels that the "ordinary case" analysis itself renders the residual clause unconstitutionally void. If a court cannot determine the "ordinary case" of the predicate offense, then a court cannot proceed with its risk analysis – enumerated offenses or not. The *Johnson* Court made clear that the "ordinary case" problem was really the central distinguishing and dispositive feature, by stating: "*More importantly*, almost all of the cited laws require gauging the riskiness of conduct in which an individual engages on a particular occasion. ... The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561 (emphasis added). For this very reason, *Dimaya*, 803 F.3d at 1117-18, *Vivas-Ceja*, 808 F.3d at 723, and *Edmundson,* 153 F. Supp. 3d at 862, all flatly rejected the government's argument that *Johnson* turned on the enumerated offenses. Reasonable jurists, thus, have seriously debated the very argument the *Ovalles* panel adopted without responding to any of the above concerns.

Notably, this very issue was one that split the Fifth Circuit in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. Aug. 5, 2016)(en banc). As four reasonable jurists on that court rightly pointed out in their dissent from that decision, even without a prefatory list of examples "through judicial interpretation, §16(b) not only contains an example, it *contains the very example that most troubled the* Johnson *Court*. Specifically, the Supreme Court has previously explained that burglary is the 'classic example' of a §16(b) crime," "[a]nd 'burglary' was the most confusing of the residual clause's 'confusing examples.'

If 'burglary' is a confusing example in one statute, then it is just as confusing in the other." 831 F.3d at 685 (Jolly, J. joined by Stewart, C.J., Dennis, J., and Graves, J., dissenting)("the (judicially created) example in §16(b) is nearly as confusing as the textual examples in the residual clause;" and again, any distinction between the two statutes is not salient enough to constitutionally matter")(emphasis in original).

The lack of enumerated examples in §924(c) thus does not make its residual clause any more clear. If anything, the lack of a prefatory list makes §924(c)'s residual clause *more* capacious that the ACCA's residual clause. Indeed, because §924(c) lacks a prefatory list of examples, its residual clause covers *every* offense that involves a "substantial risk of the use of physical force against the person or property of another." *See Begay v. United States*, 553 U.S. 137, 144 (2008) ("Congress rejected a broad proposal that would have [amended the ACCA to cover] *every* offense that involved a substantial risk of the use of physical force against the person or property of another.")(internal quotation marks omitted).

In *Welch*, the Supreme Court confirmed that "[t]he residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. Significantly, the *Welch* Court did not even mention the list of enumerated crimes, let alone indicate the list was relevant to its holding. Thus, contrary to the finding in *Ovalles*, the list of examples within the ACCA is not a legally "material" difference between the two clauses. At the very least, the panel's conclusion on that point could be debated by reasonable jurists.

5. The same confusion surrounds §924(c)'s residual clause (and its twin §16(b)'s residual clause) as surrounded the ACCA's and, in any event, this was not a dispositive part of the *Johnson*'s holding. A final reason given by the *Ovalles* panel for why §924(c)'s residual clause is not unconstitutionally vague is that courts have not had the same difficulty construing it as they have had with the ACCA's residual clause. 861 F.3d at 1265. But that argument simply "ignores the reality of judicial review." *Shuti*, 828 F.3d at 450. That the Supreme Court has not taken any cases regarding §924(c)'s residual clause, and therefore has not experienced "repeated failures" in interpreting §924(c)'s residual clause, is "probative only of the Court's composition of its docket – not absence of vagueness in the provision." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 n.21 (3d Cir. 2016); *Shuti*, 828 F.3d at 450 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978)(Stevens, J., respecting the denial of certiorari)("The Supreme Court's docket is almost entirely discretionary."). The *Johnson* Court's discussion of its repeated failures in crafting a "principle and objective standard" was simply additional evidence confirming the residual clause's vagueness. *Shuti*, 828 F.3d at 450 ("[T]he government mistakes a correlation for causation; conflicting judicial interpretations only provide *ex post* 'evidence of vagueness'"). The Supreme Court's failures in attempting to develop a workable standard for the ACCA's residual clause "was not a necessary condition to the Court's vagueness determination." *Vivas-Ceja*, 808 F.3d at 723.

Moreover, the *Ovalles* panel's suggestion that §924(c)(3)(B), unlike the ACCA, is not shrouded in confusion, is at the very least debatable if not demonstrably incorrect since the panel glossed over the fact that cases addressing §924(c) and §16(b) regularly rely on ACCA cases, and *vice-versa*. Confusion over the meaning of § 924(c)'s residual clause is subsumed in the confusion surrounding the ACCA because federal courts use the same body of precedent to interpret all three. Thus, confusion surrounding the ACCA reflects difficulties with §924(c)(3)(B) and §16(b), even without the same explicit chorus of criticism. And indeed, some circuits have actually split over how to apply §16(b), which is additional evidence of the confusion surrounding the language of the residual clause of §16(b) and its twin in § 924(c)'s residual clause. *See e.g., Chambers*, 555 U.S. at 133 (Alito and Thomas, JJ., concurring)(citing some illustrative cases). There is no reasonable way to separate the level of confusion over the scope of these three residual clauses.

In any event, as the Seventh Circuit explained in *Vivas-Ceja*, "[t]hat the [ACCA] residual clause had persistently eluded stable construction, was *additional* evidence that served to 'confirm its hopeless indeterminancy.' *Johnson*, 135 S. Ct. at 2558. The chaotic state of the caselaw was not a necessary condition to the Court's vagueness determination." 808 F.3d at 723 (citation and internal quotation marks omitted) (emphasis added). Nor is it a necessary condition to strike down the §924(c) residual clause. *See also Dimaya*, 803 F.3d at 1119 ("That the Supreme Court has decided more residual clause cases than §16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.").

6. The Contrary Circuit Decisions followed in Ovalles are Unpersuasive. The *Ovalles* panel explicitly adopted the arguments advanced in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), *pet. for cert. filed* Oct. 12, 2016 (No. 16-6392); *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); and *United States v. Prickett*, 839 F.3d 697 *8th Cir. 2016), *pet. for cert filed* Dec. 30, 2016 (No. 16-7373). But the reasoning in these decisions is not only debatable by jurists from other circuits who have rejected as immaterial the points of distinction upon which these decisions have relied. The reasoning *Ovalles* relied upon most extensively – that of the Sixth Circuit in *Taylor* – is highly debatable even within the Sixth Circuit itself.

As a threshold matter, the panel decision in *Taylor* upon which *Ovalles* relied, was not itself a unanimous decision. Dissenting judge, Judge Helene White, persuasively criticized the majority opinion. In doing so, Judge White reiterated the importance of the categorical approach in analyzing crimes of violence under §924(c)(3)(B), notably citing this Circuit's decision in *McGuire* for that proposition. *See id.* at 393-98 & n.19 (White, J., dissenting)("Although a fact-centric approach might make sense in the §924(j) context because th[at] statute addresses present rather than past conduct, case law squarely holds that the ["by its nature"] language of §924(c) requires courts to use a categorical approach; citing *McGuire*, 706 F.3d at 1336-1337). The *Taylor* majority opinion, however, minimized that key point of similarity. *See id.* at 378. For the reasons set forth in Judge White's dissenting opinion, as well as those advanced by the Seventh, Ninth, and Tenth Circuits, the majority opinion in *Taylor* is unpersuasive.

Furthermore, it is noteworthy that the Sixth Circuit itself appears to have receded from, or at least substantially limited, its decision in *Taylor*. In its July 2016 decision in *Shuti v. Lynch*, a unanimous panel of that court squarely held that *Johnson* rendered §16(b) unconstitutionally vague in the immigration context, notwithstanding its earlier decision in *Taylor*. Specifically, it accepted the petitioner's argument, and expressly agreed with the Seventh and Ninth Circuits, that §16(b) "suffer[ed] from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws." 828 F.3d at 445. In doing so, the Sixth Circuit rejected the government's attempts to distinguish the two residual clauses. *See id.* at *446-50

Even more notable, the Sixth Circuit in *Shuti* understood its earlier decision in *Taylor* to be based on the fact that §924(c) involves "real-world conduct," and therefore did not require application of the categorical approach. *Id.* at 449-50. According to the *Shuti* court, that "ma[de] all the difference," since *Johnson* was limited only to statutes applying the categorical/ordinary-case approach. *Id.* at 450 ("We understand *Taylor*, then, as applying *Johnson*'s real-world conduct exception to upholding the constitutionality of" §924(c)'s elements clause). In that regard, the Sixth Circuit emphasized that this limitation of *Johnson* was subsequently reiterated by the Supreme Court in *Welch*, and the court in *Taylor* "did not have the benefit of the Court's guidance in that regard." *Id.*

That limited reading of *Taylor* is critical here, because, as explained above, binding precedent from this Court in *McGuire* makes clear that the same categorical approach governing the ACCA also governs §924(c)'s residual clause. Accordingly, under this Circuit's prior panel precedent rule, the *Ovalles* panel should have been legally precluded by *McGuire* from following *Taylor*, given that the Sixth Circuit has since clarified that *Taylor* rests on the premise that the categorical approach does not apply to §924(c). And that premise is contrary to this Circuit's binding precedent in *McGuire*.

For these reasons, reasonable jurists could debate – and are still debating –

whether the residual clause in §924(c)(3)(B) is void for vagueness.

B. Mr. Silva Medina's § 924(c) Conviction on Count 6 and § 924(o) Conviction on Count 5 are Duplicitous Because they Charge Four Separate and Distinct Offenses

Mr. Silva Medina's indictment charged more than one predicate offense – conspiracy to commit Hobbs Act robbery, attempt to commit Hobbs Act robbery, conspiracy to possess with intent to distribute five kilograms or more of cocaine, and attempt to possess with intent to distribute five kilograms or more of cocaine – in support of the §924(c) and §924(o) offenses, and the jury returned a general verdict. Under those circumstances, *Gomez* held, the jury could have convicted on the §924(c) offense "without reaching unanimous agreement on during which crime it was that [the defendant] possessed the firearm." *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016). And the "lack of specificity" in the verdict had Sixth Amendment significance under *Alleyene v. United States*, 133 S.Ct. 2151, 2155 (2013) because the jury's undifferentiated findings increased a minimum mandatory. *Gomez*, 830 F.3d at 1228-1229.

Because it is impossible to know the true basis for the Count 5 and 6 convictions, and Alleyne and the Sixth Amendment preclude any further judicial fact-finding on that point, the Court must presume Counts 5 and 6 rested upon the least culpable crime charged – aiding and abetting a Hobbs Act robbery or conspiracy to commit a Hobbs Act robbery. Any other result would be tantamount to the type of judicial fact-finding prohibited by *Alleyne*. 830 F.3d at 1227-1228.

C. Reasonable Jurists Could Debate Whether Attempted Hobbs Act Robbery is a "Crime of Violence" Under § 924(c)'s Elements Clause

Reasonable jurists within this Circuit have already debated whether aiding and abetting a Hobbs Act robbery categorically qualifies as a "crime of violence" within §924(c)'s elements clause.

In *In re Colon*, 826 F.3d 1301 (11th Cir. 2016), Judge Martin dissented from the majority's decision that aiding and abetting a Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in §924(c)(3)(A)." She distinguished aiding and abetting a Hobbs Act robbery from the substantive crime, arguing (1) that *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003), the sole authority relied upon by the majority may not have survived *Johnson*, and (2) that it was "plausible that a defendant could aid and abet a robbery without using, threatening, or attempting any force at all." *Colon*, 826 F.3d at 1306-1307 (Martin, J., dissenting)(citing *Rosemond v. United States*, 134 S.Ct. 1240, 1246-47 (2014), for the principle that "[e]ven when a principal's crime involves an element of force, there is 'no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, ... *courts have never thought relevant the importance of the aid rendered*.'") (emphasis in original).

Judge Martin was "not willing to assume, as the majority [did there], that aiding and abetting crimes meet the 'elements clause' definition simply because an aider and abettor 'is punishable as a principal.' 18 U.S.C. §2(a)." *Colon*, *id.* at 1308 (Martin, J., dissenting). Instead, because a defendant could clearly be convicted of aiding and abetting a Hobbs Act robbery "based on his aid of an element of robbery that involved no force," Judge Martin explained aiding and abetting a Hobbs Act robbery should not satisfy §924(c)'s elements clause.

And indeed, in light of *Rosemond* (not considered by the *Colon* majority) reasonable jurists could well debate whether an aiding and abetting crime categorically meets §924(c)(3)(A). As Judge Martin correctly observed, this Court had never held until *In re Colon* "that aiding and abetting crimes fall under §924(c)(3)(A)." *Id.* Notably, Judge Jill Pryor has implicitly recognized that the issue is still debatable as well, notwithstanding *In re Colon*, by granting a COA in *Levatte v. United States*, Case No. 16-17685 (11th Cir. June 6, 2017). The Court should so find here.

D. Reasonable Jurists Could Debate Whether Conspiracy to Commit Hobbs Act Robbery Qualifies as a "Crime of Violence" Under § 924(c)'s Elements Clause

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

Thus, for present purposes, a verbal or written agreement to commit Hobbs Act robbery is the least culpable way of committing the offense. *See, e.g.*, *Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). That way of committing the offense clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a "crime of violence."

Several courts around the country have already persuasively so held. *See, e.g.*, *United States v. Edmundson*, 153 F. Supp. 3d at 859 (D. Md. Dec. 23, 2015) ("The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another."); *United States v. Ledbetter*, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("this Court agrees" that conspiracy to commit Hobbs Act robbery "qualifie[d] *only* under the 'residual clause' from § 924(c)(3)(B)"); *United States v. Luong*, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) ("The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause."). These decisions are persuasive, as reflected by this Court's favorable citation to them in *In re Pinder*, 824 F.3d 977, 979 n.1 (11th Cir. June 1, 2016).

And, in fact, this Court has held that a "prior conviction for non-overt act criminal conspiracy" to commit strong-arm robbery was not a crime of violence under the Sentencing Guidelines. *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010). That case focused on whether the offense satisfied the residual clause, indicating that the parties and the Court considered it obvious that conspiracy to commit a violent offense does not satisfy the elements clause where no overt act is required. The same is true here. In sum, and in accordance with *Whitson* and every district court to address the issue after *Johnson*, it is clear that a non-overt act conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s elements clause.

CONCLUSION

For the foregoing reasons, Mr. Silva Medina respectfully requests that this Court grant a COA.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ M. Caroline McCrae
M. Caroline McCrae
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,787 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

/s/ M. Caroline McCrae
M. Caroline McCrae

CERTIFICATE OF SERVICE

I certify that on this 13th day of December, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, U.S. Attorneys' Office, 99 N.E. 4th Street, Miami, FL 33132-2111.

/s/ M. Caroline McCrae
M. Caroline McCrae

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-23386-ROSENBERG/WHITE

OMAR SILVA MEDINA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_________________________________/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon Movant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE 4], which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. On May 22, 2017, Magistrate Judge White issued a Report and Recommendation [DE 26] recommending that Movant's Motion be denied. On July 24, 2017, the Court entered an Order Staying Case and Directing the Clerk of the Court to Close This Case for Administrative Purposes [DE 32]. Pursuant to that Order, this case was stayed for 60 days in light of the Eleventh Circuit Court of Appeals' stay of its mandate in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). The 60-day stay of this case has now expired and is hereby **LIFTED**.

The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation; has reviewed Petitioner's Objections thereto [DE 27], Respondent's Response to Objections [DE 29], Respondent's Notice of Supplemental Authority [DE 30], and Petitioner's Response to Respondent's Notice of Supplemental Authority [DE 31]; has reviewed the entire record; and is otherwise fully advised in the premises. Upon review, the Court finds Magistrate

Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Magistrate Judge White's Report and Recommendation and concludes that Movant's Motion should be denied for the reasons set forth therein. In addition, the Court concludes that Movant's Motion should be denied in light of *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). While the Court notes that the Eleventh Circuit Court of Appeals' mandate in that case remains stayed, *Ovalles* is nevertheless binding precedent "unless and until it is reversed, overruled, vacated, or otherwise modified by the Supreme Court of the United States or by [the Eleventh Circuit] sitting *en banc*." *See Lamar v. United States*, No. 8:06-CR-00199-T-24, 2010 WL 3259500, at *4 n.6 (M.D. Fla. Aug. 18, 2010) (quoting *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992)); *see also* 11th Cir. IOP 2, *Effect of Mandate on Precedential Value of Opinion* ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 26] is **ADOPTED**.
2. Movant's Motion [DE 4] is **DENIED**.
3. A certificate of appealability **SHALL NOT ISSUE**.
4. This case remains **CLOSED**.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 29th day of September, 2017.

Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-23386-ROSENBERG
(08-CR-20287-GOLD)
MAGISTRATE JUDGE P.A. WHITE

OMAR SILVA MEDINA, :

Movant, :

v. :

UNITED STATES OF AMERICA, :

Respondent. :

REPORT OF MAGISTRATE JUDGE

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 08-CR-20287-GOLD. This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the order from the Eleventh Circuit Court of Appeals granting Movant leave to file a second § 2255 motion (DE1), Movant's pro se motion (CV-DE#4), Movant's pro se memorandum of law in support thereof (CV-DE#5), Movant's counseled memorandum of law in support of his motion (CV-DE#11), the government's response (CV-DE#12), Movant's counseled reply (CV-DE#15), Movant's Notice of Supplemental Authority (DE#17), Movant's Supplemental Memorandum of Law (DE#20), the government's Supplemental Briefing (DE#23), Movant's Reply to Government's Supplemental Briefing (DE#24), and all pertinent portions of the underlying criminal file.

Claims

Movant's sole claim in this proceeding is that his convictions for conspiracy and for using and carrying a firearm during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(o) & © are unlawful in light of the Supreme Court's decision in the Supreme Court's ruling in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015).

Procedural History

Movant was arrested on March 27, 2008, and charged with one count of conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846, one count of attempting to possess with intent to distribute more than five kilograms of cocaine in violation of 18 U.S.C. § 846, one count of conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), one count of attempting to commit a Hobbs Act robbery in violation of 18 U.S.C. §1951(a), one count of conspiracy to use, carry or possess a firearm during and in relation to a crime of violence and drug trafficking crime in violation of 18 U.S.C. § 924(o), and one count of using and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). (CR-DE#37). The charges stemmed from a conspiracy and attempt to commit a robbery of narcotics, alleged to have occurred on March 27, 2008. (Id.; PSI, Offense Conduct).

Movant proceeded to trial, and was convicted of all counts. A PSI was prepared in anticipation of sentencing. Movant's total offense level was 34. (PSI, ¶34). Movant had no criminal history points, resulting in a criminal history category of I. (Id. at ¶48). Movant was not subjected to any Chapter Four enhancements, either as an Armed Career Criminal, or as a Career Offender under the Guidelines. (Id. at ¶43).

Movant was sentenced to prison terms of 132 months on Counts 1 - 5, to be followed by a consecutive 60-month term on Count 6 (the 924(c) count). (CR-DE#186). Movant unsuccessfully appealed his conviction and sentence to the Eleventh Circuit. (CR-DE#240). Movant also filed an initial motion to vacate pursuant to §2255, which was denied. (CR-DE#243, 245).

On June 16, 2016, pursuant to the "prison mailbox rule," Movant filed an application with the Eleventh Circuit for leave to file a second motion pursuant to §2255. (See DE#1).[1] On August 4, 2016, the Eleventh Circuit granted the application. (Id.). In so doing, the Eleventh Circuit stated:

> We have granted this application because it is unclear which companion conviction formed the basis for Medina's § 924© convictions and sentences, meaning that Medina has made a prima facie case sufficient to allow him to file a successive § 2255 motion raising a Johnson claim in the district court. But to succeed on that claim in the district court, Medina will shoulder the burden of actually proving that he is entitled to relief on this claim . . . That is, Medina will, at the outset, bear the burden of proving that his conviction of carrying a firearm during an underlying offense was based only on the charged underlying crimes of violence, not also on the charged underlying drug trafficking offense . . .

In re: Omar Silva Medina, No. 16-14154-J, p.8 (11th Cir., August 8, 2016) (emphasis in original).

Timeliness and Procedural Bar

The government contends for the first time in its supplemental briefing that Movant's motion is untimely because Johnson does not apply to §924's residual clause, and that Movant's claims are

[1]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule"). Here, Movant's claim is predicated upon a the Supreme Court's decision in Johnson, supra.

procedurally barred for failure to raise them on direct appeal. (DE#23). However, the government never raised the statute of limitations or the procedural bar in its initial response to the motion (DE#12), and the Court's order for supplemental briefing (DE#19) did not raise either of these issues *sua sponte*. Therefore, the Court finds that the government has waived both defenses in this case. See Day v. McDonough, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006)(the AEDPA statute of limitations defense is not jurisdictional and is subject to waiver by the failure to raise it initially); Howard v. United States, 374 F.3d 1068, 1073 (11th Cir. 2004) (holding in § 2255 case that Government's failure to raise procedural default waives the procedural bar defense); Shukwit v. United States, 973 F.2d 903, 904 (11th Cir. 1992) (stating that procedurally defaulted claim was cognizable in § 2255 proceeding when Government had failed to raise procedural default in district court).

Discussion

The Court of Appeals may grant a § 2255 movant leave to file a second or successive motion if the Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). The statute further provides that the Court may authorize the filing of a second or successive application "only if it determines that the application makes a *prima facie* showing that the application satisfies the requirements of this

subsection." Id. However, the Court of Appeals' determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination. Jordan v. Sec'y, Dep't of Corrs., 485 F.3d 1351, 1357-58 (11th Cir. 2007). Thereafter, the District Court must decide in the first instance whether Movant has met the statutory criteria of § 2255(h). Id. at 1357 ("the district court not only can, but must, determine for itself whether those [§ 2255(h)] requirements are met"); 28 U.S.C. § 2244(b)(4) (cross-referenced in § 2255(h)). In making that determination, the District Court owes no deference to the findings of the Eleventh Circuit's *prima facie* determination that the requirements have been met, and instead must conduct a *de novo* review of the matter. Id. see also In re Moss, 703 F.3d 1301, 1303 (11th Cir. 2013) (threshold determination by appellate court is a "limited determination" and district court must decide "fresh" if the requirements of § 2255(h) are met and, if they are, then consider the merits of the motion).

Here, as set forth above, the Eleventh Circuit explicitly stated in its order granting Movant leave to file this second §2255 motion that Movant bears the initial burden of proving that his §924 convictions were "based only on the charged underlying crimes of violence, not also on the charged underlying drug trafficking offense . . ." In re: Medina, No. 16-14154-J, p.8. This Movant cannot do.

Under the Armed Career Criminal Act of 1984 ("ACCA"), a defendant convicted of being a felon in possession of a firearm faces a more severe punishment if he or she has three or more convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. The ACCA defines "violent felony" any crime punishable by imprisonment exceeding one year that:

> (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The words "or otherwise involves conduct that presents a serious potential risk of physical injury to another" have come to be known as the Act's residual clause. Johnson v. United States, 135 S.Ct. 2551, 2555-56 (2015). As everyone by now is well aware, in Johnson, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague, and that imposing an enhanced sentence pursuant to that clause thus violates the Constitution's guarantee of due process. 135 S.Ct. at 2563.

Here, Movant was not convicted of being a felon in possession of a firearm in violation of § 924(g). Moreover, he did not receive any enhanced sentence under § 924(e) of the ACCA, or as a Career Offender under th Federal Sentencing Guidelines. Movant's only potential argument, therefore, is that he was not convicted of conspiracy to use, carry or possess a firearm during and in relation to a "crime of violence" within the meaning of 18 U.S.C. § 924(o), or of using and carrying a firearm during and in relation to "crime of violence" within the meaning of 18 U.S.C. § 924©.

Title 18 U.S.C. § 924(c)(1)(A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." The statute further defines "crime of violence" as any felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). As such, § 924(c)(3) contains a "residual clause," very similar to the residual clause declared unconstitutionally vague in Johnson.[2]

In In re Pinder, 824 F.3d 977 (11th Cir. 2016), the Eleventh Circuit concluded that an applicant seeking authorization to file a second or successive § 2255 motion had made a *prima facie* showing that his claim contained a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, in a case wherein the defendant's claim was that he was subjected to an unlawfully enhanced penalty under § 924© in light of Johnson. See 824 F.3d at 978. The Court stated, however, that the law was unsettled as to whether the rule announced in Johnson invalidated the defendant's sentence. Id. at 979.

The problem for Movant is that nothing in Johnson calls into question predicating an ACCA enhancement upon a prior conviction for a "serious drug offense."[3] United States v. Darling, 619 F. App'x 877, 880 (11th Cir. 2015) ("The Supreme Court's recent decision in Johnson . . . has no bearing on Darling's sentence because he had more than three predicate convictions for "serious drug offenses" as defined in 18 U.S.C. § 924(e)(2)(A)(ii)"); see also In re Rogers, 825 F.3d 1335, 1340 (11th Cir. 2016)(When . . . it is clear . . . that each predicate conviction qualified under the ACCA's elements or enumerated crimes clause, or as a serious drug offense . . . then [an application for authorization to file a second or successive § 2255 motion] does not 'contain' a Johnson claim."); In re Robinson, 822 F.3d 1196, 1197 (11th Cir.

[2]The ACCA's residual clause that was held to be unconstitutionally vague in Johnson defines "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

[3]The ACCA provides for enhanced penalties for felons in possession of firearms who have three or more prior convictions for a "serious drug offense," or a "violent felony," as those terms are defined in the Act. See 18 U.S.C. § 924(e).

2016)("[T]he rule announced in Johnson does not benefit Robinson. Robinson's ACCA sentence was based on convictions for two serious drug offenses, as well as convictions for armed robbery and for aggravated battery with a firearm.").

"Serious drug offense" is defined in the ACCA as:

> (I) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

18 U.S.C. § 924(e)(2)(A). Similarly, § 924©, the portion of the ACCA that Movant pleaded guilty to violating for various weapons offenses "during and in relation to a crime of violence or drug trafficking crime," defines "drug trafficking crime" as:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

18 U.S.C. § 924(c)(2). And here, as set forth above, the crime at issue was robbery of narcotics, which was specifically referenced in the indictment as a drug trafficking crime, and Movant was also convicted of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and attempt to possess with intent to distribute cocaine in violation of 21 U.S.C. § 841. Stated another way, even assuming for the sake of argument that Movant's § 924 convictions were not during and in relation to of a "crime of violence," they were still in during and in relation to

a "drug trafficking crime." As such, Johnson does not afford Movant any relief.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant is not entitled to relief on the merits, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find the court's treatment of any of Movant's claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 22nd day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

M. Caroline McCrae
Federal Public Defender
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Marlene Rodriguez
United States Attorney's Office
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Miami, FL 33132

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

OMAR SILVA MEDINA

JUDGMENT IN A CRIMINAL CASE

Case Number: 08-20287-CR-GOLD

USM Number: 80370-004

Counsel For Defendant: Juan de Jesus Gonzalez, Esquire
Counsel For The United States: AUSA James Koukios and AUSA Marlene Rodriguez
Court Reporter: Joseph Millikan

The defendant was found guilty on Count(s) 1 through 6 of the Indictment.

The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. §846	Conspiracy to possess with intent to distribute five kilograms or more of cocaine.	03/27/08	1
21 U.S.C. §846	Attempt to possess with intent to distribute five kilograms or more of cocaine.	03/27/08	2
18 U.S.C. §1951(a)	Conspiracy to affect commerce by means of robbery.	03/27/08	3 & 4
18 U.S.C. §924(o)	Conspiracy to use and possess a firearm in furtherance of a crime of violence and a drug trafficking offense.	03/27/08	5
18 U.S.C. §924(c)(1)(A)	Carrying a firearm in furtherance of a crime of violence and a drug trafficking offense.	03/27/08	6

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
1/26/2009

ALAN S. GOLD
United States District Judge

January 27, 2009

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **192 months**. The term consists of 132 months as to Counts 1 through 5, to be served concurrently with each other, and 60 months as to Count 6, to run consecutively to the term imposed in all other counts.

The Court makes the following recommendations to the Bureau of Prisons:
The defendant be designated to a facility in Miami-Dade County or, in the alternative, in South Florida so that he may be close to his family.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ________________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:________________________________
Deputy U.S. Marshal

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five years**. The term consists of five years as to Counts 1, 2 and 6 and three years as to Counts 3, 4 and 5, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$600.00	**$**	**$**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: OMAR SILVA MEDINA
CASE NUMBER: 08-20287-CR-GOLD

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$600.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:
(a) one High Standard Model K1200 Riot shotgun;
(b) one Smith and Wesson .38 caliber revolver;
(c) one Beretta .25 caliber semi-automatic pistol;
(d) one Glock .40 caliber semi-automatic pistol; and
(e) ammunition.

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.